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No. 82-1504

In the Supreme Court of the United States

OCTOBER TERM, 1982

L. G. EVERIST, INC., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
(FORMERLY THE UNITED STATES COURT OF CLAIMS)**

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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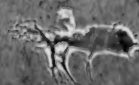


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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Court of Claims erred in granting summary judgment for the United States because conflicting inferences could be drawn from the uncontroverted facts surrounding petitioner's contractual relationship with the government.

1. On May 2, 1979, petitioner entered into a contract with the United States Soil Conservation Service ("SCS"), involving the Aravaipa Creek Emergency Watershed Project (Pet. App. A2, A6, A15). The project called for emergency restoration of the Aravaipa Creek stream bank, using rock facing known as "riprap" as a foundation to prevent erosion (*id.* at A2).

¹Effective October 1, 1982, the Court of Claims was abolished and its appellate jurisdiction transferred to the newly-created United States Court of Appeals for the Federal Circuit. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 *et seq.*

On March 16, 1979, the SCS issued an Invitation For Bids that contained the contract and specifications (Pet. App. A15-A19). The specifications required the contractor to locate, select and excavate the source of rocks to be used in the project. The rock source itself was subject to approval by an SCS engineer with respect to the quantity and quality of the rock derived therefrom for use as riprap for the project (*id.* at A3, A19). The contract did not specify any particular rock source for the riprap, but a nearby quarry, known as Lackner Quarry, which petitioner used to obtain the necessary rocks, had been approved by the government (*id.* at A5). The Invitation For Bids urged bidders to visit the site and examine the nature and location of the work (*id.* at A7, A16).

Shortly after the contract was awarded to petitioner, its quarrying operations produced an excessive amount of undersized rock due to breakage that failed to meet the contract specifications for riprap. This quarrying problem resulted in a 70-day delay in completing the project and in greater than anticipated expense to petitioner (Pet. App. A6). Liquidated damages for the delay were assessed against petitioner.

In accordance with the Contract Disputes Act of 1978, 41 U.S.C. (Supp. V) 605(a), petitioner submitted claims to the Contracting Officer for the amount of liquidated damages and for \$478,268 under the contract's Differing Site Conditions clause, which permitted an equitable adjustment if physical conditions at the site differed materially from those indicated in the contract. Petitioner's claims were denied by the Contracting Officer on September 11, 1980 (Pet. 8; Pet. App. A6).

2. Petitioner filed this action under 41 U.S.C. (Supp. V) 609 in the Court of Claims seeking de novo review of its claims against the United States for equitable adjustment under the contract and for fraudulent misrepresentation

and intentional failure to disclose information available to SCS regarding the condition of the rock at the Lackner Quarry. The court granted summary judgment for the government pursuant to Court of Claims Rule 101(d), which is identical in all material respects to Fed. R. Civ. P. 56(c).

The Court of Claims rejected petitioner's claim of fraudulent misrepresentation of the quality of the rock source on grounds that the contract and the specifications drew a clear distinction, understood by the parties, between the required physical characteristics of the riprap and the commercial requirements concerning the quality and quantity of the rock source from which the riprap was to be derived (Pet. App. A7). The court also rejected petitioner's claim that the government withheld superior knowledge concerning the rock's potential for excessive breakage on the ground that petitioner had access to the same information as the government concerning the rock's waste potential (*id.* at A8-A9). Finally, the court rejected petitioner's claim under the contract's Differing Site Conditions clause because the terms of the contract made it clear that Lackner Quarry was not the work site to which the clause applied; it was merely a potential source of rock to be used at the work site (*id.* at A9).

3. The Court of Claims correctly determined that the record presented no genuine issue of material fact for purposes of disposing of the case on summary judgment. Petitioner argues (Pet. 10-16) that the court's decision is premised upon an improper standard for granting summary judgment and is thus inconsistent with *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). In those cases this Court held that the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, but neither case required a trial

where, as here, conflicting inferences drawn by one litigant are plainly unreasonable. See *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975); cf. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289 (1968). In the present case, the Court of Claims carefully considered the conclusions reached by petitioner based on the undisputed underlying facts and held that petitioner's claims were factually unsupported. The decision below is thus fully consistent with this Court's decisions; moreover, since the decision affects no one other than petitioner, it does not warrant review by this Court.²

Petitioner also argues (Pet. 15-16) that the Court of Claims, by granting summary judgment, deprived petitioner of its statutory right to a trial de novo under Section 10 of the Contract Disputes Act of 1978, 41 U.S.C. (Supp. V) 609. But petitioner received de novo review of its claim, because the court's analysis was in no way limited by the

²Petitioner discusses at length (Pet. 16-30) the inferences it draws from the facts, but those fact-specific arguments were fully considered and properly rejected by the Court of Claims. With regard to the misrepresentation claim, the court correctly held that the government's representations that the quality of rock at the quarry was "approved" and that the quarry contained an adequate quantity of rock were no basis for assuming, as petitioner did, that the quarry site would supply rock at any particular cost. At most it was a representation that an adequate supply of rock was available at the Lackner Quarry, but petitioner does not deny that it obtained all the rock it needed from that quarry.

With regard to the claim of superior knowledge, the court found that the government had no access to information not reasonably available to petitioner. Indeed, petitioner's employee reached nearly an identical conclusion regarding the nature of the quarry (Pet. App. A3), but petitioner decided to bid on the project without further testing. Finally, as the Court of Claims held (*id* at A9), the "Differing Site Conditions" clause was never intended to cover a quarry neither owned by the government nor designated as the source for rock for the project.

prior determination against petitioner by the Contracting Officer. Disposition of the case by summary judgment because no material facts were in dispute was fully consistent with the requirements of the Contract Disputes Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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